

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 AUSTIN DIVISION

3 EASTMAN CHEMICAL COMPANY) Docket No. A 12-CA-57 SS
4)
4 vs.) Austin, Texas
5)
5 PLASTIPURE, INC.,)
CERTICHEM, INC.) February 6, 2013
6

7 TRANSCRIPT OF ALL PENDING MATTERS
8 BEFORE THE HONORABLE SAM SPARKS

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25 Proceedings reported by computerized stenography, transcript
produced by computer.

10:09:15 1 THE COURT: 12-CA-57, Eastman Chemical Company vs.
10:09:19 2 PlastiPure, et cetera.

10:09:23 3 I have a **motion for protective order** and several
10:09:28 4 ancillary motions that relate to it, motion to file the document
10:09:35 5 sealed, motion to strike an affidavit of O'Brien, motion to seal
10:09:42 6 the motion to strike.

10:09:51 7 So the defense has the motion.

10:09:54 8 MR. HARRISON: The plaintiff has the motion for
10:09:55 9 protection, your Honor.

10:09:56 10 THE COURT: Okay. Then you have it.

10:10:00 11 MR. HARRISON: Your Honor, yesterday, you were
10:10:02 12 delivered some notebooks by the defendants with their motions in
10:10:06 13 them. It didn't complain -- their pleadings, it didn't contain
10:10:10 14 the plaintiff's motion in reply. I made notebooks, knowing you
10:10:15 15 need extra paper. If it's convenient for the Court and the
10:10:18 16 clerk, I'll be happy to give them. They only contain our motion
10:10:21 17 and our reply that's the subject of the hearing.

10:10:25 18 THE COURT: I didn't receive anything yesterday.

10:10:29 19 MR. HARRISON: I just got a letter from Mr. Donley they
10:10:32 20 delivered it to your chambers.

10:10:33 21 THE COURT: Did you get anything yesterday?

10:10:35 22 LAW CLERK: No.

10:10:35 23 THE COURT: Maybe they gave it to Judge Yeakel. I'm
10:10:38 24 just going to assign this case to Judge Yeakel.

10:10:44 25 MR. WINGARD: We intended to file with you a courtesy

10:10:46 1 copy of the motion to strike the affidavit because it's our
10:10:51 2 understanding that things that are filed within two days of the
10:10:53 3 hearing do not --

10:10:54 4 THE COURT: We've had a lot of trouble, yes. Okay.
10:10:58 5 Well, I'm sure -- that's to strike O'Brien's affidavit?

10:11:03 6 MR. WINGARD: Yes, sir.

10:11:03 7 THE COURT: All right. Okay. The only -- yeah.

10:11:10 8 MR. HARRISON: Your Honor, and I'm going to try to be
10:11:12 9 quite brief. I do want the Court to know since this is also a
10:11:18 10 status conference on all issues, this is a significant case.
10:11:23 11 Eastman will show damages at trial over \$5 million. We've taken
10:11:30 12 13 depositions, I believe. Counsel and I have conferred
10:11:35 13 yesterday, we have 15 or more to go. We've exchanged over
10:11:40 14 100,000 pages of documents. I think we're close to the end of
10:11:45 15 the paper trail.

10:11:47 16 But all this -- this case began, your Honor, with the
10:11:51 17 defendant publishing statements about Eastman's Tritan.

10:11:55 18 THE COURT: I remember.

10:11:56 19 MR. HARRISON: And so, Eastman brought this case under
10:11:59 20 the Lanham Act concerning those statements, which we allege to be
10:12:03 21 false. The defendants' business model, your Honor, which will be
10:12:08 22 presented in writing, is to create a public panic about endocrine
10:12:15 23 activity in plastic so the public will -- and manufacturers will
10:12:19 24 go to the defendants and secure, supposedly, EA-free plastic.

10:12:27 25 And this penchant for publicity is really why we're

10:12:30 1 here today: because as pointed out in Exhibit C to our motion,
10:12:35 2 Dr. Bittner, who's the founder of the defendant companies, stated
10:12:40 3 in a press release last July that this case shouldn't be tried in
10:12:44 4 a court of law. It should be tried in a court of public opinion.

10:12:48 5 So we're here today, your Honor, about two categories
10:12:51 6 of documents. One, a draft manuscript that was sent to a journal
10:12:56 7 and portions of it ultimately published, and then, the base
10:13:02 8 underlying --

10:13:03 9 THE COURT: The portion published was published as one
10:13:08 10 instrument?

10:13:09 11 MR. HARRISON: Yes, your Honor.

10:13:10 12 THE COURT: Okay. I want to be sure.

10:13:12 13 MR. HARRISON: And then, also, the other category is
10:13:14 14 the underlying test data from four laboratories that have done
10:13:20 15 testing on Eastman's Tritan and which Eastman has publicly stated
10:13:28 16 that the tests show that Tritan is EA-free or has no endocrine
10:13:33 17 activity.

10:13:35 18 The documents in question have the lowest level of
10:13:39 19 protection under the Western District protective order. They're
10:13:43 20 labeled confidential which, as your Honor knows, they can be used
10:13:48 21 by any of the litigants, the parties, their witnesses for the
10:13:53 22 pursuit of this case. They just can't be publicly disclosed.
10:14:00 23 And what the defendants want to do and what they've told us they
10:14:04 24 want to do if they're successful at this hearing, your Honor, is
10:14:10 25 to take some of these documents out of context and go public with

10:14:14 1 them.

10:14:15 2 For instance, with the journal there are statements by
10:14:20 3 the five authors that they were funded by Eastman in
10:14:24 4 participating and writing the paper. Those have never been made
10:14:29 5 public, and, for whatever reason, the scientific journal that
10:14:33 6 published the paper did not make any mention that Eastman funded
10:14:39 7 the study.

10:14:40 8 So if those letters are allowed to go public, it will
10:14:44 9 be in the context of, well, Eastman paid for this, but the
10:14:48 10 journal says that they didn't, or doesn't say anything, so
10:14:53 11 somebody's hiding something here. We can't battle that in the
10:14:57 12 court of public opinion, your Honor. They're free to use those
10:15:03 13 in cross-examining witnesses. They're free to use it in front of
10:15:05 14 a jury. You know, they can go to credibility or whatever. But
10:15:10 15 to pull those statements out -- because Eastman couldn't control
10:15:13 16 what the publisher did. It didn't -- you know, it didn't know or
10:15:17 17 have any say over whether the publisher said Eastman paid part of
10:15:22 18 this or Eastman didn't. It's why it's confidential, your Honor.

10:15:26 19 And it would just be a manifest injustice, we believe,
10:15:29 20 to allow that to go out to the public, totally out of context.
10:15:40 21 And I want to, again, emphasize that --

10:15:43 22 THE COURT: Well, you've had an article.

10:15:47 23 MR. HARRISON: Yes, sir.

10:15:48 24 THE COURT: A publication.

10:15:49 25 MR. HARRISON: Yes, sir.

10:15:50 1 THE COURT: Apparently there was a draft of it and
10:15:58 2 then, a final publication and it's published.

10:16:01 3 MR. HARRISON: Exactly. And the published article,
10:16:03 4 there's no problem with it, your Honor.

10:16:05 5 THE COURT: Well, but your problem is who paid for it.
10:16:10 6 That they're going to say you paid for it; therefore, there's no
10:16:13 7 validity to it.

10:16:15 8 MR. HARRISON: Yes, sir.

10:16:15 9 THE COURT: Okay.

10:16:17 10 MR. HARRISON: And I just -- all we want --

10:16:19 11 THE COURT: We see that all the time.

10:16:21 12 MR. HARRISON: Well, of course. But we see that in the
10:16:24 13 context of our rules, our evidence, and we can handle that here.
10:16:29 14 It's hard for us to handle, though, if it's a press release to
10:16:34 15 the United States that Eastman hid the fact that it funded the
10:16:39 16 study. Eastman had no control over what that paper ultimately
10:16:42 17 said. That's the problem, your Honor. We shouldn't be put to
10:16:48 18 the task of having to defend out in the public arena something
10:16:54 19 like this.

10:16:59 20 Likewise, your Honor, with respect to the tests,
10:17:05 21 defendants seem to take the position that because Eastman has
10:17:07 22 said we've tested Tritan and it's EA-free, that that opens the
10:17:14 23 door to all of the underlying tests that have been done. And
10:17:19 24 again, they have access to all those tests, they've been
10:17:22 25 furnished to them. They're getting ready to go and depose the

10:17:25 1 four testing labs that did the tests. They're going to learn all
10:17:28 2 of that.

10:17:29 3 But let's just say in an entity that did 100 different
10:17:35 4 series of tests on Tritan, one showed that it might have EA, an
10:17:45 5 outlier. But if they can get you to remove the confidentiality
10:17:51 6 layer on all of those tests, they can go public and say, Eastman
10:17:57 7 lies when it says that Tritan is EA-free because testing company
10:18:02 8 X found EA in this one test. The public won't know that testing
10:18:11 9 company X did 100 tests and sent a report to Eastman that said,
10:18:16 10 we believe Tritan is EA-free.

10:18:19 11 And so, again, it will be -- it will go public totally
10:18:24 12 out of context and to Eastman's detriment. And the curious
10:18:30 13 thing, your Honor, is that defendants won't even produce all of
10:18:35 14 their underlying test data to the plaintiff. There's some they
10:18:39 15 won't even give us, say it's too secret to show you, although
10:18:45 16 they have published documents and they were public that say,
10:18:50 17 we've tested thousands and thousands of types of plastic and 92
10:18:55 18 percent of them have EA. But they don't want us to even be able
10:19:00 19 to use that and see it at all.

10:19:03 20 What we do have, a lot of it is labeled "AEO" so our
10:19:07 21 client can't see. And we've kind of roped along and lived with
10:19:11 22 that, your Honor, to avoid being here. But if we're going to be
10:19:17 23 trying this case in the newspaper, then we're going to be back in
10:19:21 24 here asking you to release classification on their documents, and
10:19:27 25 it just gets, to me, worse and worse.

10:19:31 1 There is no detriment to the defendants to go forward
10:19:35 2 with the classifications just as they are. They have total
10:19:38 3 access to these documents. They can use them any way they wish.
10:19:42 4 But they've shown you no good reason to remove the classification
10:19:52 5 so they can go public with them. And --

10:19:55 6 THE COURT: Do I even have a motion to that effect?

10:19:58 7 MR. HARRISON: Well, once you -- the way your order
10:20:04 8 works, your Honor, is that we classified the documents
10:20:09 9 confidential. They sent us a letter saying, we're challenging
10:20:13 10 that classification on these particular documents. Once they did
10:20:18 11 that, it triggered a 14-day period during which we had to file a
10:20:22 12 motion to protect the classification.

10:20:27 13 So our motion to protect, if you deny it, means that
10:20:31 14 our classification automatically goes away, and the documents
10:20:35 15 have no protection.

10:20:37 16 THE COURT: Well, so what do you want me to do?

10:20:42 17 MR. HARRISON: I want you to grant plaintiff's motion
10:20:45 18 to let us maintain the classification of these documents.

10:20:49 19 THE COURT: That relates to a published,
10:20:53 20 out-in-the-world article.

10:20:55 21 MR. HARRISON: No. That relates to five letters that
10:20:59 22 the coauthors of that article sent to the publisher that have
10:21:03 23 never been made public. That's what I want to protect. And,
10:21:10 24 also, these hundreds and hundreds of individual tests that have
10:21:15 25 been done by these laboratories, I want to protect those so they

10:21:19 1 can't be taken, one, out of context and taken to the public
10:21:25 2 arena.

10:21:26 3 And I'm doing no more than they've done in spades --

10:21:31 4 THE COURT: Well, now, now, now, I'm not worried about
10:21:33 5 what they've done yet.

10:21:34 6 MR. HARRISON: I gotcha.

10:21:35 7 THE COURT: But I don't see -- are all of these tests
10:21:40 8 that were done, done in a confidential manner?

10:21:45 9 MR. HARRISON: Yes, sir.

10:21:46 10 THE COURT: And their results never released to the
10:21:48 11 public?

10:21:49 12 MR. HARRISON: No.

10:21:49 13 THE COURT: Except you've indicated.

10:21:52 14 MR. HARRISON: I'm sorry. I misspoke.

10:21:52 15 THE COURT: You've indicated to me, just now, that you
10:21:54 16 said we've tested thousands and we're home free.

10:21:58 17 MR. HARRISON: Here's what happens, your Honor. A lab
10:22:01 18 will test -- they'll run a number of tests, and then, they'll
But not the data as in a peer-reviewed study

10:22:06 19 write Eastman a report. We've definitely gone public with the
10:22:10 20 reports from those laboratories. And the reports are, after
10:22:15 21 looking at all this data, we don't find any EA in Tritan.

10:22:20 22 But if you go down into the, you know -- and I don't
10:22:23 23 even know it to be the case, but I suspect, because I know now,
10:22:28 24 after being in this case a year, kind of how all of this testing
10:22:31 25 works, I'll bet you can find an outlier test that, you know,

10:22:37 1 shows some potential for possibly having EA, and it will be one
10:22:43 2 out of many, many.

10:22:45 3 And so, I don't believe -- since that laboratory has
10:22:49 4 issued a report, they can go to the lab. They're getting ready
10:22:53 5 to. They can take their deposition. They can point out whatever
10:22:59 6 they find, see how the lab explains it, and then, we try that in
10:23:03 7 front of your Honor and a court and a jury. But to take anything
10:23:10 8 out of context and go public with it, send it to NGOs, issue a
10:23:15 9 press release, oh, look, here it is, this test showed possible EA
10:23:19 10 in Tritan. It's difficult for Eastman to battle that and it
10:23:26 11 shouldn't have to, your Honor. That's what the classifications
10:23:30 12 are for.

10:23:31 13 We're just trying to keep --

10:23:34 14 THE COURT: You know, I have a lot of patents cases. I
10:23:36 15 have a lot of Lanham Act cases. I can't control the press. I
10:23:41 16 can't control the press -- I can impose sanctions when I think
10:23:45 17 it's inappropriate. But here, you want me to blank it out. As
10:23:52 18 far as I'm concerned, I wouldn't seal anything. It's a lawsuit,
10:23:55 19 it ought to be exposed. You are the ones that sealed things, not
10:23:59 20 this court.

10:24:02 21 When you file motions to seal and there's no
10:24:04 22 opposition, I sign on to it. Anybody comes in under the law that
10:24:08 23 they think could, the press, for example, I've got to go through
10:24:13 24 an elaborate procedure and nine times out of ten will release the
10:24:18 25 information. The information is always released when you get to

10:24:21 1 trial because I don't seal the courtroom. It's a public
10:24:25 2 courtroom that media can sit out there and listen to whatever
10:24:27 3 they want and print whatever they want.

10:24:34 4 And you say this is an important case. Every single
10:24:37 5 case that's in federal court is important --

10:24:39 6 MR. HARRISON: Certainly it is.

10:24:40 7 THE COURT: -- to the litigants. And I'm not a
10:24:44 8 policeman of what anybody publishes.

10:24:48 9 MR. HARRISON: Well, your Honor, you do have control
10:24:50 10 over what the litigants do with their documents and the documents
10:24:56 11 they're being required to produce in the court process. And
10:25:00 12 here -- and you have Dr. O'Brien's affidavit and they've got some
10:25:04 13 attacks on it, based on the deposition and questions that were
10:25:07 14 asked totally out of context to his declaration.

10:25:09 15 THE COURT: Well, they -- that's not even here. They
10:25:12 16 say he gave testimony in opposition to his affidavit, but they
10:25:20 17 didn't confirm it with anything.

10:25:21 18 MR. HARRISON: Well, what they -- what he said in his
10:25:24 19 declaration that's attached to our motion is that with these four
10:25:28 20 laboratories, they operated under nondisclosure agreements and
10:25:33 21 the testing -- **Impossible to peer-review or replicate. Low credibility.**
10:25:37 22 **the raw data of the tests has always been**
10:25:43 23 **maintained confidential by Eastman and by the laboratories. So**
it has always been maintained that way.

10:25:47 24 THE COURT: You're going to use the results of those
10:25:52 25 tests.

10:25:55 1 MR. HARRISON: Yes, sir. I'm going to use the results
10:25:59 2 of the ultimate testing program. Yes.

10:26:00 3 THE COURT: Well, yeah, you can -- but they are
10:26:03 4 entitled to the cross-examination of how you got there and what
10:26:07 5 they also found.

10:26:08 6 MR. HARRISON: But, your Honor, they can do that. A
10:26:10 7 confidential document is totally available to them. They can use
10:26:15 8 it with their experts. They can use it with their clients. They
10:26:19 9 can use it with anybody that's --

10:26:20 10 THE COURT: Has Eastman published anything that we've
10:26:26 11 done testing and there's no validity to this attack?

10:26:32 12 MR. HARRISON: Eastman has stated that it has --

10:26:35 13 THE COURT: Right. You've used it for the same purpose
10:26:37 14 they're trying to use it.

10:26:40 15 MR. HARRISON: But what we have not done is gotten down
10:26:44 16 into the labyrinth of tests -- and, your Honor, if the rules are
10:26:51 17 we don't want to seal anything, then we'll just come over here
10:26:56 18 Friday with a motion to unseal everything they've got, and we'll
10:26:59 19 try it all open, if that's the Court's, you know, inclination.

10:27:02 20 THE COURT: It's not the Court's inclination. What I'm
10:27:05 21 telling you is everything that's sealed is because y'all asked
10:27:09 22 it. If you're going to complain about it, I'll release it. I
10:27:15 23 think everything ought to be in the public, anyway.

10:27:17 24 But you can't file a lawsuit, suing for millions of
10:27:21 25 dollars, and then, come in and say, there may be something that

10:27:23 1 they can find and they're going to say something ugly. People
10:27:27 2 say things ugly all the time, and if they say it erroneously,
10:27:32 3 then you've got a cause of action against them. If they say it
10:27:34 4 legally, you don't have a cause of action against them.

10:27:37 5 MR. HARRISON: Your Honor, all this documentation, they
10:27:40 6 have. We've given it to them. We've just said, you have to put
10:27:44 7 the lowest layer of protection on it so you don't put it in the
10:27:47 8 Austin American-Statesman. You can use it any way you want to to
10:27:52 9 further this litigation, and they have it and they've been using
10:27:56 10 it.

10:27:56 11 THE COURT: All right.

10:28:02 12 MR. HARRISON: Thanks.

10:28:03 13 THE COURT: I'll hear the other side.

10:28:09 14 MR. WINGARD: Your Honor, Steve Wingard for CertiChem.
10:28:12 15 I'm here with Ray Donley. George Butts and Rob Hargrove
10:28:15 16 represent PlastiPure.

10:28:16 17 The reason that CertiChem and PlastiPure want to
10:28:22 18 declassify these documents is because they're not confidential.
10:28:25 19 Eastman's argument has put the burden on us to prove that these
10:28:28 20 documents need to be declassified where, in fact, the burden is
10:28:33 21 that the party that's seeking to protect the information has to
10:28:36 22 come forward with the particular and specific demonstration, and
10:28:41 23 not conclusory statements, that the material is either trade
10:28:45 24 secret or confidential, and that there is some identifiable and
10:28:51 25 significant harm that would befall Eastman if these documents

10:28:55 1 were declassified.

10:28:56 2 THE COURT: If I've taken something out of context and
10:28:59 3 put it in the national press I think would constitute that.

10:29:03 4 MR. WINGARD: Your Honor, there is -- there's no
10:29:05 5 statement in Mr. O'Brien's declaration that meets that
10:29:11 6 evidentiary requirement. There's no statement in his declaration
10:29:15 7 that meets the first requirement that shows with particular and
10:29:20 8 specific demonstrations of fact that there are trade secrets or
10:29:23 9 confidential information in the two very limited areas of
10:29:28 10 evidence that we'd like to be declassified. And the first area
10:29:32 11 is the paper that was submitted by an independent -- not by
10:29:36 12 Eastman, by an independent third-party author to an independent
10:29:41 13 scientific journal.

10:29:43 14 **Author was paid (not independent)**
Independent third-party author wrote the paper, sent it
10:29:47 15 **journal known for industry bias, not objective**
to an independent scientific journal without reservation.

10:29:51 16 There's nothing in that transmission of the manuscript that says
10:29:56 17 anything in here is confidential. And there's no evidence before
10:29:58 18 this court from that author, from the journal, or from anybody
10:30:02 19 else, that that's -- that transmission of information was
10:30:06 20 intended to be confidential.

10:30:08 21 Mr. O'Brien may say it's typically these sorts of
10:30:12 22 submissions are kept confidential, but he doesn't give the
10:30:15 23 particular specific demonstration of what the confidentiality
10:30:19 24 agreement was in this case for that submission.

10:30:23 25 THE COURT: Well, didn't I just hear counsel say that

10:30:28 1 the publisher of the article and his client considered it
10:30:40 2 confidential or had an agreement that it was confidential? I
10:30:43 3 mean, didn't I just hear that?

10:30:46 4 MR. WINGARD: I don't think you heard counsel, Mr.
10:30:49 5 Harrison say that there was some sort of an agreement between Dr.
10:30:54 6 Osimitz, who was the corresponding author, and the Food and
10:30:58 7 Chemical Toxicology editor Elsevier. I don't think there's any
10:31:02 8 evidence that come close to saying that.

10:31:05 9 Instead, I think there is a declaration and a statement
10:31:07 10 in the declaration from Mr. Emmett O'Brien where Mr. O'Brien says
10:31:12 11 that these sorts of things are generally kept confidential. And
10:31:16 12 the peer-review process is really what he focuses on because he
10:31:19 13 was mistaken in his belief that what we were seeking to
10:31:23 14 declassify included the peer-reviewed comments that in the
10:31:27 15 scientific journal area are typically not released to the public.

10:31:33 16 We're not trying to make any of those peer-reviewed
10:31:35 17 comments public. We're simply trying to say that when a
10:31:38 18 third-party author submits a manuscript for publication to a
10:31:42 19 scientific journal and there's no reservation or any kind of a
10:31:45 20 statement that this is supposed to be kept confidential, it's
10:31:48 21 just not confidential, and they haven't met their burden.

10:31:51 22 In the second very --

10:31:53 23 THE COURT: I thought he said that you were trying to
10:31:55 24 say that Eastman paid for it.

10:32:00 25 MR. WINGARD: Part of the submission. That submission

10:32:01 1 between Dr. Osimitz and the journal includes what they call
10:32:05 2 conflict of interest statements. Those conflict of interest
10:32:08 3 statements from the three or four scientists who ran the tests
10:32:12 4 all do say that Eastman paid for and funded this work. And that
10:32:16 5 would be part of what we would declassify. That's right.

10:32:20 6 The second area of --

10:32:23 7 THE COURT: So why don't you select something that you
10:32:25 8 want me to declassify for them and y'all stop bothering me, and
10:32:32 9 I'll declassify one for each side until we have a trial? Let's
10:32:38 10 make it weekly. I'd like to get y'all to bother me every week
10:32:43 11 about what's going to be in the press, as if a single juror is
10:32:49 12 ever going to hear it, why the competitor market might be that
10:32:55 13 type of thing.

10:32:58 14 But don't give me this you want just good public to
10:33:04 15 know everything. Y'all are competitors. You're suing each
10:33:09 16 other. And you want to take one part out of this for them and
10:33:19 17 say, these tests are not valid because Eastman paid for it, which
10:33:26 18 doesn't mean they're not valid at all, but you might can get a
10:33:30 19 press release to say that.

10:33:32 20 MR. WINGARD: Your Honor, I'm not agreeing with Mr.
10:33:35 21 Harrison's characterization of why we want the stuff
10:33:38 22 declassified.

10:33:38 23 THE COURT: I understand that. I understand that.

10:33:41 24 MR. WINGARD: Eastman is a multi-billion-dollar company
10:33:44 25 that's trying to squash my client, trying to kill it before we

10:33:47 1 even get to trial. And the major basis of them doing it is
10:33:50 2 they've got this published, peer-reviewed scientific journal that
10:33:54 3 they're taking to people who would otherwise be our customers.

10:33:56 4 THE COURT: And so, disprove it in the courtroom.

10:33:59 5 MR. WINGARD: We will. We will.

10:34:00 6 THE COURT: This is no different from a patents case
10:34:04 7 that involves millions and millions and billions of dollars, and
10:34:10 8 they get all sorts of information that may or may not need
10:34:15 9 sealing, but they all want everything sealing. They try their
10:34:20 10 case and the winner gets to publish whatever they want. I won't
10:34:27 11 seal a courtroom. So all of this is going to come out in a
10:34:31 12 trial.

10:34:34 13 Now, you're set for July. Why do you want to do all of
10:34:41 14 this right now?

10:34:42 15 MR. WINGARD: Your Honor, we want to be able to go
10:34:44 16 public with things that are already public -- that are public.
10:34:47 17 They're not private. They're not confidential. They haven't
10:34:49 18 showed any --

10:34:49 19 THE COURT: Why?

10:34:51 20 MR. WINGARD: Because we're trying to get -- we're
10:34:53 21 trying to be able to take the information that they're using
10:34:55 22 against us to kill our business and show that the folks who would
10:34:59 23 do business with us, what their testing really shows.

10:35:03 24 THE COURT: Well, why didn't you do it a year ago?

10:35:06 25 MR. WINGARD: We didn't have all the data and the

10:35:08 1 analysis of the data until recently.

10:35:10 2 THE COURT: How long have you had it?

10:35:13 3 MR. WINGARD: Your Honor, I think we probably got their
10:35:15 4 data beginning in August of last year.

10:35:17 5 THE COURT: And then, all of a sudden, you decide with
10:35:22 6 an oncoming trial to try to get some publicity. So you've had
10:35:36 7 last year, '12, six months?

10:35:40 8 MR. WINGARD: Your Honor, on this issue -- if I may
10:35:43 9 explain that. On this issue, we have been talking to Eastman
10:35:45 10 about this for months. We have been trying to avoid coming here
10:35:49 11 and bothering this court. We've talked about lots of different
10:35:51 12 issues. And I think, you know, it's a compliment to Mr. Harrison
10:35:55 13 and a compliment to Mr. Butts on both sides that we have not had
10:35:59 14 to bother you since we became involved in this case.

10:36:02 15 This is a very important issue to our client. This is
10:36:05 16 an issue that may make or break the client before we get to
10:36:09 17 trial. And the point is that they can't meet the burden that
10:36:12 18 they have to meet because this information -- and I want to make
10:36:16 19 this clear because I think maybe the record will be unclear
10:36:19 20 otherwise.

10:36:20 21 The data that we're seeking to have declassified is not
10:36:24 22 all of the data from every test that Eastman has given us in this
10:36:28 23 case. It's just the data that's the data discussed in the
10:36:33 24 publication, a peer-reviewed publication that Eastman has made
10:36:37 25 public. Eastman chose to make certain of its data public through

10:36:42 1 graphs and summaries and descriptions of what their tests were
10:36:45 2 and what their tests show. We're seeking merely to have that
10:36:49 3 manuscript and the data that underlies the manuscript
10:36:52 4 declassified.

10:36:53 5 And so, I don't want the Court to think that this is
10:36:56 6 going to be where we're taking all of the information that
10:36:59 7 Eastman has given us and trying to declassify. We agree that
10:37:04 8 some of their technical testing information has never been
10:37:06 9 disclosed publicly and should remain classified. But that which
10:37:10 10 they have chosen to put on their website, discussed in scientific
10:37:15 11 conferences, and big posters talk about things that they have
10:37:20 12 decided to feed to the public relations firms who speak to all
10:37:26 13 the journalists in the news media outlets.

10:37:29 14 You know, all of the damages that they can identify in
10:37:32 15 this case, Judge, every bit of it, they have no actual harm from
10:37:36 16 anything that we've ever said other than what they call
10:37:38 17 corrective advertising. They spent a half a million dollars to
10:37:41 18 hire a PR firm to go out and plant information in various media
10:37:45 19 sources, including things like, you know, everything from Twitter
10:37:49 20 to the New York Times.

10:37:51 21 So that's the damages that they're going to show the
10:37:54 22 jury in this case. Nothing but corrective advertising. And yet,
10:37:58 23 they're here complaining that we might go to the media. And so,
10:38:01 24 it's --

10:38:06 25 THE COURT: All right. You're representing to me that

10:38:14 1 what you want and to have published is the residual data
10:38:20 2 supporting a published article that has not heretofore been
10:38:24 3 published by Eastman.

10:38:29 4 MR. WINGARD: They have published some of the data and
10:38:31 5 not all of the data, and we would have the data in its entirety.
10:38:36 6 They talk about particular tests that they ran and those form the
10:38:40 7 basis of the paper, and we would have the Court declassify all of
10:38:45 8 the data from those specific tests that they discussed in that
10:38:48 9 paper and nothing else. That's it.

10:38:55 10 THE COURT: What about the one that ran the data?

10:38:59 11 MR. WINGARD: Pardon me?

10:39:00 12 THE COURT: What about the author of the publication?

10:39:05 13 MR. WINGARD: The author --

10:39:06 14 THE COURT: It seems to me that you have a copyright or
10:39:12 15 they must have some protection.

10:39:13 16 MR. WINGARD: Your Honor, that's a good point and
10:39:15 17 that's what I thought they would have supported their motion for
10:39:18 18 protection with is something from the author of the paper,
10:39:20 19 something from the journal itself. Some --

10:39:23 20 THE COURT: Is he or she or it aware that this is what
10:39:26 21 you're going to do?

10:39:28 22 MR. WINGARD: Your Honor, Dr. Osimitz is working
10:39:31 23 intimately with Eastman in publishing additional papers. If they
10:39:36 24 could have gotten an affidavit from Dr. Osimitz, I'm sure they
10:39:39 25 would have gotten an affidavit from Dr. Osimitz if that was

10:39:42 1 intended to be confidential.

10:39:43 2 When Dr. Osimitz responded to a subpoena in this case,
10:39:48 3 Dr. Osimitz presented all this same information not marked
10:39:53 4 confidential because he didn't view it as confidential. They
10:39:57 5 didn't have an affidavit from Dr. Osimitz, who wrote the paper,
10:40:00 6 that it was confidential because he doesn't think it's
10:40:01 7 confidential.

10:40:13 8 THE COURT: What's the publication called?

10:40:16 9 MR. WINGARD: Food and Chemical Toxicology.

10:40:31 10 THE COURT: And when was it published?

10:40:35 11 MR. WINGARD: In 2012. It was submitted on August 24th
10:40:42 12 of 2011. But you're asking when it was published.

10:40:47 13 MR. DONLEY: February of 2012.

10:40:49 14 MR. WINGARD: February of 2012.

10:40:54 15 THE COURT: And is that what it was -- is Food and
10:41:01 16 Chemical Toxicology the magazine or the book that it was --

10:41:05 17 MR. WINGARD: Yes, Judge.

10:41:06 18 THE COURT: And it was Dr. Osamit, O-S-A-M-I-T?

10:41:10 19 MR. WINGARD: It's O-S-I-M-I-T-Z.

10:41:33 20 The specific pages that comprise the submission of the
10:41:37 21 manuscript that we would like declassified are attached to our
10:41:41 22 response. So you can see exactly what this submission looked
10:41:48 23 like. The data that underlies this submission is scattered
10:41:56 24 throughout Eastman's production. I'm not asking the Court to
10:41:59 25 identify by Bates label that which would be declassified. I'm

10:42:04 1 confident if the Court were to make the order that the data be
10:42:07 2 declassified, that working with Mr. Harrison and his team, we
10:42:11 3 could identify and reach agreement on that data that underlies
10:42:17 4 the paper.

10:42:23 5 But, Judge, that's our response that they had a burden
10:42:25 6 to meet when they came into that, and they haven't met it.

10:42:27 7 THE COURT: I'm still not -- you say it's data
10:42:30 8 scattered throughout Eastman.

10:42:34 9 MR. WINGARD: Well, yes. Let me give you a "for
10:42:36 10 instance."

10:42:38 11 One of the testing institutions that provided
10:42:42 12 information that made it into the publication was a company
10:42:45 13 called CeeTox. That's C-E-E-T-O-X. CeeTox did a variety of
10:42:52 14 tests on different things. They tested monomers that go into the
10:42:59 15 Tritan copolymer resin. They also tested extracts from the
10:43:04 16 copolymer resin. What was put in the paper, in the Food and
10:43:10 17 Chemical Toxicology paper was the data that related to testing of
10:43:15 18 the monomers but not data with any of the testing of the extracts
10:43:21 19 from the Tritan resin.

10:43:23 20 We would not seek to declassify the reports or any of
10:43:27 21 the underlying data from the testing of the resin. We would seek
10:43:30 22 to declassify the testing of the monomers because that's what was
10:43:34 23 in the paper. And those reports, just because of the way that
10:43:39 24 they were gathered, I assume, are produced in various iterations.
10:43:44 25 You know, maybe this guy got them in the e-mail on one day, and

10:43:47 1 then, person, you know, X got it on a different day in a
10:43:51 2 different e-mail. So you'll see repeated copies of all of these
10:43:54 3 bits of information.

10:43:55 4 We would only ask, you know, one version of that which
10:43:59 5 was published in the paper be declassified, and I think the
10:44:04 6 parties could reach agreement between themselves what the scope
10:44:07 7 of that declassification is.

10:44:23 8 THE COURT: Okay. Mr. Butts wants to get up.

10:44:28 9 MR. BUTTS: If I could have just a couple of words.

10:44:31 10 I'm George Butts. I represent PlastiPure.

10:44:34 11 Let me focus what we're -- why we're asking for this
10:44:39 12 information. The paper that was published, as has been said, did
10:44:43 13 not disclose that Eastman paid the author and that Eastman and
10:44:48 14 others participated in drafting the paper and were also paid by
10:44:56 15 Eastman. The information that we're seeking to have disclosed --
10:44:58 16 and this is just a tiny tip of an iceberg about all of the
10:45:02 17 testing that's been done and the information available about this
10:45:07 18 does not -- would disclose what the paper as published did not
10:45:12 19 disclose, that is, that Eastman paid the person who wrote this
10:45:17 20 paper and all of the people who participated and contributed
10:45:21 21 information to the paper. They were all paid by Eastman.

10:45:25 22 Now, Eastman has published information on a continuing
10:45:30 23 basis about the test that they did. They don't publish the test
10:45:34 24 results, which are just little numbers that don't mean a lot.
10:45:37 25 But they have said, time and again, and have published to their

10:45:41 1 customers, to the public in brochures, in videos, in speeches,
10:45:47 2 that all of their tests show that there is no EA.

10:45:52 3 What our clients who have been just completely kind of
10:45:55 4 -- they just had a lid put on what they can discuss about this
10:45:59 5 issue would like to do is to show at least some little glimmer of
10:46:04 6 light on what's been going on, and that is simply to be able to
10:46:08 7 show that this paper that Eastman has been touting as a basis for
10:46:13 8 saying there is no estrogenic activity in their product was paid
10:46:18 9 for lock, stock and barrel by Eastman. And at this point, we
10:46:22 10 can't say that because that information was confidential under
10:46:26 11 the Court's order but as designated by Eastman.

10:46:31 12 We're simply asking the Court as to that piece of
10:46:32 13 information and there could be, I agree with the Court, thousands
10:46:36 14 of other pieces of information on both sides that could and
10:46:38 15 should be released to the public. We're asking just in this
10:46:44 16 motion as to that specific thing that the confidentiality order
10:46:49 17 be lifted. And let me say one other thing and then, I'll sit
10:46:52 18 down.

10:46:52 19 THE COURT: What about all the data underlying the
10:46:54 20 article, the statements and article that hasn't been -- you know,
10:47:01 21 that's more than identifying that it's funded by Eastman. I
10:47:06 22 mean, y'all are leaving me --

10:47:09 23 MR. BUTTS: That was published in an article.

10:47:11 24 THE COURT: -- and I don't have a tree.

10:47:14 25 MR. BUTTS: The data that we're talking about in this

10:47:17 1 narrow focus as to this paper, that data is, for the most part,
10:47:20 2 published in the article.

10:47:22 3 Now, there is an immense amount of data and when we try
10:47:24 4 this case -- and I'm -- I don't see any way the case isn't going
10:47:29 5 to be tried -- we're going to have a lot to say about the testing
10:47:32 6 that Eastman did, about the quality of it, about the design of
10:47:37 7 it, which was clearly calculated to be sure they didn't find any
10:47:41 8 EA.

10:47:44 9 But the data that we're talking about here was, for the
10:47:46 10 most part, published in the paper. What we're talking about that
10:47:50 11 would be in addition to that is simply letting the world know,
10:47:54 12 simply letting the -- and let me say, I agree with the Court.
10:47:57 13 The jurors who might read anything about this -- they probably
10:48:02 14 won't read it, they won't care about it, they won't understand
10:48:04 15 it. We'd like to be able to talk to our customers, people who we
10:48:07 16 are trying to get to do business with these two tiny companies
10:48:11 17 that Eastman has its foot on their throat and doing everything it
10:48:16 18 can to squeeze the life out of it.

10:48:19 19 No. I'm talking about releasing information that we
10:48:21 20 can use.

10:48:21 21 THE COURT: I'm talking about let's stay with what
10:48:23 22 we're doing. I don't see any jurors over there.

10:48:25 23 MR. BUTTS: No. I understand. I'm talking about right
10:48:27 24 now, releasing information that we can use that we can attempt to
10:48:32 25 save these companies with by going to potential customers and

10:48:36 1 saying, look here, everything that Eastman has said at least in
10:48:40 2 this paper, they paid for.

10:48:46 3 THE COURT: I think we've moved from data to an
10:48:52 4 admission that you paid for. Why wouldn't you have to answer an
10:48:54 5 interrogatory request for admission admitting the amounts that
10:48:57 6 you paid to whom participated in this article?

10:49:05 7 MR. HARRISON: Just never has been asked, your Honor.

10:49:07 8 THE COURT: Well, I mean, that's just information that
10:49:13 9 you can't get out of.

10:49:17 10 MR. HARRISON: And, your Honor, we're not trying to do
10:49:20 11 that. We just would like for everything to be -- be done in a
10:49:26 12 proper context. I attached to our motion two press releases Dr.
10:49:34 13 Bittner released last summer, and he says things like, defendant
10:49:38 14 CertiChem and PlastiPure have results that show Tritan resins in
10:49:42 15 products leach chemicals having significant EA. EA is harmful
10:49:46 16 for people. Eastman Chemical squelching debate on consumer
10:49:52 17 safety in baby bottles, August 13th, Austin, Texas.

10:49:58 18 Bear in mind that the business model of the defendants
10:50:01 19 is to scare the public and get them to run to the defendants for
10:50:05 20 a seal of approval on their plastic. All they're asking for is
10:50:11 21 more fuel for that.

10:50:12 22 But let me just -- let's go to where we are here, this
10:50:16 23 motion. They said we didn't show any -- meet any burden of
10:50:20 24 proof. Dr. O'Brien's declaration states very clearly that the
10:50:26 25 European Safety Commission, their equivalent of the FDA, are

10:50:31 1 trying to minimize animal studies.

10:50:37 2 So if a company goes to the -- I don't remember the
10:50:40 3 acronym for it but to that entity to register a new compound for
10:50:46 4 using and a study has already been done -- let's say one of the
10:50:51 5 monomers in Tritan, DHDM, or whatever, Tritan -- Eastman has done
10:50:59 6 animal studies on that. Well, this new registrant is not
10:51:03 7 permitted to go do new testing. It has to go and purchase access
10:51:09 8 to that testing from someone that's already done it.

10:51:12 9 That being the case, Eastman's testing has significant
10:51:17 10 monetary value because they've done it. It's sitting there.
10:51:21 11 Other entities can purchase it. All that value goes away if it's
10:51:26 12 not deemed confidential. And that's why they've always held all
10:51:31 13 of that baseline testing to be confidential. Has nothing to do
10:51:37 14 with the results or what they've said about the results, but it's
10:51:40 15 -- you go into all these rat studies and everything we did,
10:51:45 16 that's confidential because we can sell it.

10:51:48 17 So we did meet our burden on it. There's a significant
10:51:51 18 issue at Eastman if you just rip confidential off of these
10:51:57 19 underlying tests. Now, I don't even know what they really mean
10:52:02 20 when they say, well, we only want the test that underlie the
10:52:06 21 article. If it's of assistance to the Court, the article that
10:52:11 22 was published is attached to Dr. O'Brien's declaration, and it
10:52:15 23 has, you know, charts and things in it, I can't even read it.
10:52:21 24 And I don't know if they're just limiting themselves to the tests
10:52:25 25 that are behind these charts or not.

10:52:28 1 I know there's a lot more testing. And every
10:52:34 2 indication I have from the defendants was that they wanted
10:52:36 3 everything to be made public. And I'm not sure right now how we
10:52:43 4 can describe --

10:52:45 5 THE COURT: I was trying to write it down as to get a
10:52:48 6 description of the underlying data that they want. And Mr. Butts
10:52:53 7 says that they just want to show the world that that study was
10:53:04 8 funded by Eastman, just like studies that are funded by Pfizer
10:53:12 9 for medications that come out, that come out every day.

10:53:17 10 MR. HARRISON: Your Honor, next on the 20th of
10:53:22 11 February, they're supposed to take the deposition of Dr. Hussins.
10:53:26 12 All they have to do is ask it and he'll tell them, you know, and
10:53:31 13 then, it comes out. Our only problem is Eastman didn't hide the
10:53:35 14 fact. It's never hidden the fact. But here, we have a situation
10:53:41 15 where five statements of conflict that were filled out for this
10:53:46 16 publisher were filled out truthfully, and so forth, and then, the
10:53:50 17 publisher, for whatever reason, decided not to publish it. Using
10:53:55 18 that as a juxtaposition to somehow insinuate that Eastman hid the
10:54:00 19 fact of this funding isn't right.

10:54:04 20 All they need -- they could have asked it in
10:54:06 21 interrogatory. They could have asked an RFP. They can go and
10:54:10 22 they're going to depose Dr. Osimitz in two weeks and just ask
10:54:15 23 him, were you paid for this? He'll say yeah. How much? He'll
10:54:18 24 say how much. In fact, they've already got his file.

10:54:23 25 THE COURT: I take it that there were a lot of sources

10:54:25 1 for this.

10:54:29 2 MR. HARRISON: There's five authors to that paper, and
10:54:32 3 they're going to depose nearly every one of them. It's just that
10:54:35 4 no one has ever asked Eastman about this. But right now, it's in
10:54:42 5 a context where a confidential submission to this publisher may
10:54:47 6 say it's not confidential.

10:54:49 7 They have Dr. Osimitz' nondisclosure agreement with
10:54:52 8 Eastman. And so, all of the stuff he's done and all the stuff
10:54:57 9 that he has sent under -- in response to a federal subpoena they
10:55:02 10 issued -- he has a Ph.D. in microbiology or something. He didn't
10:55:09 11 stamp it confidential. But they know that everything he has in
10:55:13 12 his files that has an NDA with Eastman because he produced the
10:55:19 13 NDA to them. And Eastman produced the NDA to them.

10:55:24 14 So those files were always maintained as confidential.
10:55:31 15 Who funded the deal? It's not a secret as long as you pull it
10:55:37 16 out in the right context where they asked Dr. Osimitz, and then,
10:55:41 17 we can ask him: Do you know why the journal didn't put that on
10:55:45 18 there? We've got it. But they have the penchant, your Honor,
10:55:52 19 for trying this in the press. And I know you just hate to see us
10:55:56 20 over here but --

10:55:57 21 THE COURT: Well, that's not true. I want to see
10:56:02 22 somebody over here or I don't have a job.

10:56:05 23 MR. HARRISON: And let me say, I love the new building.
10:56:07 24 It's my first opportunity to be in it.

10:56:09 25 THE COURT: Particularly that piece of art I'm trying

10:56:11 1 to figure out.

10:56:14 2 MR. HARRISON: But, your Honor, I know you're being a
10:56:19 3 little sarcastic when you said, we'll just set y'all up for a
10:56:23 4 weekly go, but we can't fight this battle.

10:56:25 5 THE COURT: No. I've made that application to patents
10:56:31 6 lawyers for a long time. They don't want to do that.

10:56:35 7 MR. HARRISON: Well, but we can't play this game on a
10:56:38 8 different set of rules. So we will have to come back.

10:56:41 9 THE COURT: Well, I don't understand that and y'all
10:56:44 10 have confused me. They want to show and they can't show because
10:56:50 11 the information that they received right now has been under the
10:56:57 12 protective order that they signed. They want to show that
10:57:03 13 Eastman funded -- and I assume that they have basic information
10:57:10 14 that would say what Dr. Osimitz received and what labs were paid
10:57:17 15 by them. They have all of that information.

10:57:22 16 Your objection withers away after the deposition of Dr.
10:57:30 17 Osimitz if -- or does it? Are you taking the position that the
10:57:37 18 testimony he gives with regard to the compensation and the
10:57:43 19 expenditures by Eastman that led to the formulation of this
10:57:49 20 article were paid by Eastman? Would that be published?

10:57:57 21 MR. HARRISON: I think it would be, but I think it
10:57:59 22 needs to be released in the proper context. But, your Honor, by
10:58:02 23 the same token, I'm faced with an entity that's willing to say,
10:58:07 24 we've run all of these tests on Tritan, it has EA. And then, I
10:58:11 25 say, well, I want to test your test. I want to know how reliable

10:58:16 1 your test is. I want all of your data. Oh, no. We can't give
10:58:20 2 you that. And I know that's not before you right now, but it
10:58:23 3 will be.

10:58:24 4 THE COURT: I can save you a trip. I'll order it.
10:58:31 5 That's what the lawsuit's about. Now, it will be under that
10:58:35 6 protective order, but you'll get it if that's what you
10:58:41 7 represented to me.

10:58:44 8 All right. Where are we? You've got Dr. Osimitz.
10:58:53 9 You've got the information right now under the protective order
10:58:59 10 as to the expenditures by Eastman on this study. And you've got
10:59:09 11 this guy's deposition scheduled.

10:59:11 12 MR. WINGARD: Yes, your Honor. We have that. We have
10:59:14 13 the information. In fact, Emmett O'Brien in his affidavit that
10:59:19 14 Eastman submitted in their -- attached to their motions for
10:59:25 15 protection admit that the document we're talking about is a draft
10:59:29 16 of a paper commissioned by Eastman. That's not filed under seal.
10:59:37 17 So Eastman has already admitted now publicly that they've paid
10:59:40 18 for this study. This all began with the simple request to
10:59:43 19 Eastman that the paper that --

10:59:45 20 THE COURT: Well, now, what else are you going to do?
10:59:48 21 You can have the deposition obviously, and you can take his sworn
10:59:53 22 testimony obviously. And if your client is the devil hiding in
10:59:58 23 the closet, trying to break this big company and they make an
11:00:07 24 inappropriate publication, I feel confident Mr. Harrison will
11:00:11 25 bring that in for sanctions, and if I think it is, I'm not shy.

11:00:17 1 I've ordered sanctions far more than the jury verdict in patents
11:00:21 2 cases against the winner because my philosophy is, if you're in
11:00:29 3 the federal court, you'd better play by the rules.

11:00:34 4 So let me let you take the affidavit that wasn't
11:00:40 5 sealed. You can use the affidavit in the taking of the
11:00:42 6 deposition. The deposition, I have heard from counsel, is not
11:00:48 7 going to be pursuant to protective order, so whatever he
11:00:52 8 testifies is free game to be used fairly. I tell both sides, I
11:00:59 9 suspicion you've got corporate employees on both sides who feel
11:01:05 10 very strongly about this, but they'd better wait until the
11:01:10 11 trials.

11:01:10 12 MR. BUTTS: Your Honor, if I could respond directly to
11:01:12 13 your question, do we have information about the payment that was
11:01:15 14 made? To be clear, the authors of the paper, all five of them
11:01:20 15 when they submitted the paper said, we were paid by Eastman to
11:01:25 16 write this paper. It wasn't published. That's the point.

11:01:30 17 THE COURT: Yeah.

11:01:30 18 MR. BUTTS: And it's not that we don't have -- it's not
11:01:33 19 that they disagree. It's just that it wasn't put into the public
11:01:37 20 forum, and we want to be able to say that --

11:01:40 21 THE COURT: By the publisher.

11:01:42 22 MR. BUTTS: Pardon me?

11:01:43 23 THE COURT: By the publisher who could have --

11:01:44 24 MR. BUTTS: By the publisher. And so, it leaves the
11:01:46 25 misimpression or the lack of an impression that Eastman paid for

11:01:50 1 every single bit of work that is reflected in that article and
11:01:54 2 everything that was written in the article. They paid for all of
11:01:57 3 it.

11:01:58 4 THE COURT: Well, so?

11:02:01 5 MR. WINGARD: Your Honor --

11:02:02 6 THE COURT: Who would be more interested in these.

11:02:05 7 MR. WINGARD: I would point out that we do provide
11:02:07 8 evidence from Eastman's own production on page 7 of our response
11:02:11 9 where Eastman specifically misrepresents to Whole Foods here at
11:02:16 10 Austin, Texas that Eastman did not fund the study. There's a
11:02:21 11 quote from -- an e-mail from Dr. Emmett O'Brien, the same person
11:02:25 12 who signed this declaration, where it says, O'Brien states they,
11:02:28 13 referring to Whole Foods in Austin, asked if Eastman would be
11:02:32 14 able to provide documentation that we do not fund any of these
11:02:36 15 labs. I mentioned that we did not and they were happy with the
11:02:39 16 answer, end quote.

11:02:42 17 MR. HARRISON: I've got to respond to that, your Honor.

11:02:44 18 Funding laboratories is different than paying
11:02:47 19 laboratories to do work for it. Funding in the world that
11:02:52 20 scientists live in is grants. So this is almost outrageous to
11:02:58 21 take that sentence --

11:02:59 22 THE COURT: Well, let's drop outrageousness for a
11:03:02 23 minute because I don't see where the problem is.

11:03:06 24 After the deposition when you've got the sworn
11:03:08 25 testimony of Dr. Osimitz as to the contributions, compensation,

11:03:16 1 funding, grant, whatever it was that contributed to this article,
11:03:22 2 then that's outside of the protective order, period. So you can
11:03:31 3 do whatever you wish.

11:03:33 4 However, caveat: Be careful what you do until this
11:03:41 5 trial's over because tomorrow or the next day, you could read a
11:03:48 6 little bit about the Austin Police Department. And there's one
11:03:54 7 thing about it. I don't file sealed orders. All of my orders
11:03:59 8 are public.

11:04:03 9 Okay. Anything else? All right. Then I will simply
11:04:10 10 hold this motion until the deposition of Dr. Osimitz so that it
11:04:22 11 will not be used or interrupt in any way, shape or form the
11:04:28 12 deposition, which you know exactly what my ruling will be
11:04:33 13 thereafter, and that is, his testimony is not protected by the
11:04:40 14 protective order. And I'm not going to say anything further
11:04:51 15 except that it's clear to me right now, unless somebody comes in
11:04:57 16 with information otherwise, that the publisher has a right to
11:05:06 17 publish or not publish who paid for it and had the information
11:05:13 18 available.

11:05:14 19 So I wouldn't be treading on that unless you have some
11:05:17 20 real testimony that Eastman influenced them not to put it in
11:05:22 21 there. May exist. I don't have any idea. But before I made a
11:05:28 22 press statement on that with this case pending, I sure would want
11:05:34 23 to get proof on it.

11:05:39 24 All right. We'll take a ten-minute break before the
11:05:41 25 next case.

11:06:03 1 MR. HARRISON: Your Honor, you also had a hearing set
11:06:05 2 for tomorrow.

11:06:07 3 THE COURT: For trial in July and it's been set for
11:06:12 4 seven months, six or seven months, I've got a case that involves
11:06:24 5 a conspiracy by the Zetas buying horses. The government's
11:06:31 6 already sold \$41 million worth of the horses and still has 90
11:06:36 7 percent of the horses throughout the United States. It's a
11:06:42 8 money-laundering case. They don't have any idea how long it's
11:06:45 9 going to take, but three, four weeks is their estimate. So
11:06:54 10 unless -- excuse me. I'm sorry. Got it mixed up. That's March.

11:06:59 11 In July, I have United States vs. Raffle and Applegate,
11:07:06 12 which is the government's lawsuit against two individuals who
11:07:17 13 allegedly created a problem for, what was it, for ArthroCare that
11:07:27 14 ended up with securities and derivative lawsuits and that type of
11:07:32 15 thing. They anticipate, the government out of Washington, that's
11:07:36 16 going to take three weeks to try.

11:07:40 17 Point is, I don't know when I'm going to try this case.
11:07:42 18 I don't know if y'all have agreed to a magistrate. I don't know
11:07:51 19 if I've got a magistrate that could give you three weeks. Give
11:07:57 20 you two weeks with our docket. So I'm still looking for help,
11:08:06 21 not just in July but in April, with a three-week trial. Starting
11:08:17 22 a two-and-a-half-week trial two weeks Monday that's pushing my
11:08:23 23 civil docket. I'm already setting cases, as you know, for the
11:08:28 24 fall of 2014.

11:08:36 25 There is a chance but I can't anticipate it as long as

11:08:41 1 July, but I can bring in a judge. We have plenty of facilities
11:08:45 2 now. We've got new -- three other courtrooms that we can use.
11:08:50 3 Nice facilities to bring in a judge. The question is, will we
11:08:54 4 have the money to do it? I can't get any proxy for July. So I
11:09:03 5 guess, just stay tuned. That's about the only thing I can do.

11:09:09 6 I remind you, because I know you're all influential
11:09:16 7 people, that if the government would just fund the judiciary --
11:09:20 8 we're still funded in 2007. If they would fund the judiciary, it
11:09:26 9 would still be less than two-tenths of one percent of the
11:09:29 10 government expenditures. Right now, we don't even know if we're
11:09:35 11 going to have jury trials in July.

11:09:38 12 So if anybody knows anybody that can make those
11:09:42 13 decisions -- and I want to get this case tried just like I want
11:09:47 14 to get other cases tried -- call them up. Tell them to fund the
11:09:52 15 judiciary with an equal governmental party, notwithstanding what
11:09:59 16 the Congress thinks. So I'll keep you advised. Y'all aren't the
11:10:06 17 only ones. We've got a lot of cases that are in that situation.
11:10:10 18 But in July, I cannot get out of that case. I can't give it to
11:10:14 19 anybody else. I handled both the class actions. It would take a
11:10:19 20 judge a year to go through those files to be prepared in that.

11:10:25 21 So that's where we are.

11:10:28 22 MR. HARRISON: May I ask you one more thing, your
11:10:30 23 Honor?

11:10:30 24 THE COURT: Sure.

11:10:31 25 MR. HARRISON: We have agreed to extend our discovery

11:10:33 1 deadline about two weeks. It may become three, moving it way
11:10:37 2 into March.

11:10:37 3 THE COURT: I don't care what you --

11:10:38 4 MR. HARRISON: Oh, I know you don't. But our
11:10:40 5 dispositive motion deadline is April 1. There is another judge
11:10:44 6 in the building that doesn't allow you to move that on your own
11:10:46 7 volition. How does your Honor feel if we agree to move that
11:10:50 8 dispositive motion deadline?

11:10:51 9 THE COURT: I never have stopped the lawyers from
11:10:59 10 putting it. I just warn them that if I get an opportunity to try
11:11:05 11 the case, I'll carry it if I'm not through until Rule 50 motion.

11:11:12 12 MR. HARRISON: We appreciate you need to have them, you
11:11:13 13 know, before -- the day before trial. But because discovery's
11:11:17 14 bumping right up on it, it's going to be almost impossible to get
11:11:21 15 it filed.

11:11:21 16 THE COURT: I wish I could tell you I could give you 90
11:11:25 17 days. I entered two orders yesterday denying motions for
11:11:29 18 continuance for 90 days. This case probably had more discovery
11:11:34 19 than normal, but back in the good ol' days, a couple of years ago
11:11:41 20 that we changed, because we've gotten larger dockets every year
11:11:46 21 since '91, but used to, y'all could prepare a case in a year.

11:11:52 22 MR. HARRISON: It's true.

11:11:53 23 THE COURT: I guess the good ol' days when the lawyers
11:11:58 24 just got paid at the end of the case was such a wonderful time to
11:12:03 25 do business.

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MR. HARRISON: Thank you, your Honor.

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THE COURT: All right. Ten minutes.

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(End of proceedings.)

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UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Official Court Reporter, United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

WITNESS MY OFFICIAL HAND this the 25th day of February, 2013.

/s/Lily I. Reznik
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